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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1920

NG FUNG HO, otherwise known as UNG KIP; NG YUEN SHEW; GIN SANG GET and GIN SANG MO (on Habeas Corpus),
Petitioners,

vs.

EDWARD WHITE, as Commissioner of Immigration for the Port of San Francisco,
Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit,
and
BRIEF IN SUPPORT,
together with
MOTION AND NOTICE, AND APPEARANCE.

JACKSON H. RALSTON,
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Of Counsel.

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To the Honorable Edward Douglas White, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Ng Fung Ho, otherwise known as Ung Kip; Ng Yuen Shew; Gin Sang Get and Gin Sang Mo, through their attorneys and counsel pray the court to issue a writ of certiorari to bring up the above-entitled cause, as it affects your petitioners, for review.

Statement and Brief in support thereof.

The petitioners are four persons of Chinese extraction and of the Chinese race, the first two of whom are admittedly aliens, the latter two are the foreign born sons of a native born citizen, and under the terms of Sec. 1993 of the Revised Statutes, are themselves citizens of the United States. Each of the four petitioners were admitted into the United States after due and proper examination and determination of their right of admission by the proper Immigration Officials of the United States through the Port of San Francisco, where they had each arrived prior to May 5, 1917, which was the date upon which the General Immigration Act of February 5, 1917, became effective. Ng Fung Ho, otherwise known as Ung Kip, was readmitted as a merchant returning to an unrelinquished commercial domicile which had been preinvestigated and determined favorably to him before

his departure from the United States; Ng Yuen Shew was admitted into the United States upon appeal by the Secretary of Labor as the minor son of the said Ng Fung Ho; Gin Sang Get and Gin Sang Mo, brothers, were admitted by the Port Immigration Officials as citizens as above set forth. After their entry into this country and their mixing with and becoming part and parcel of our population, they were arrested under the *executive warrant of deportation proceedings* provided for in Sec. 19 of the General Immigration Act of February 5, 1917, notwithstanding that they had arrived in the United States prior to May 1, 1917, the date said Act became effective, and this, in spite of the fact that Sec. 38 of said Act holds in force unamended and unaltered, all prior laws for the subsequent prosecution of all acts, things and matters in existence at the time of the taking effect of the Act in question. The charge made was for a violation of the Chinese Exclusion Acts, rather than of the General Immigration Law whose executive deportation procedure was invoked. The Chinese Exclusion Acts *provide exclusively for a judicial deportation proceeding* as lately upheld by this court in the case of *U. S. v. Woo Jan*, 245 U. S. 552; 38 Sup. Ct. 207; where an executive warrant of the Secretary of Labor under the authority claimed to be vested in him under the Immigration Act, was held to be void.

Petitioners claim that if the question of the legality of their residence in the United States

under the Chinese Exclusion Acts is to be now drawn in question (their arrival having antedated the taking effect of the General Immigration Act of February 5, 1917), that this may only be done in a judicial deportation proceeding as exclusively provided for in the Chinese Exclusion Acts, and as upheld by this court in the *Woo Jan case*, supra. This, for the reason that the concluding section of the General Immigration Act 38, provides that it shall not alter the existing Chinese Exclusion Acts, save as to Sec. 19 which provides for the executive deportation process, and by its concluding proviso holds in force all prior laws unamended and unaltered for the prosecution of all prior acts, things and matters. Common cause was made before the lower court by your petitioners for the reason that this, the predominant point, was one common to them all. The exact point as here presented lately engrossed the attention of the Circuit Court of Appeals for the Fifth Circuit in the case of *Mayo, etc. v. U. S.*, 251 Fed. 275, and *the court there upheld the contention which these petitioners urged unavailingly before the lower court.* It is to be noted that the *Woo Jan case*, supra, was decided by this court on January 28, 1918, almost one year after the passage on February 5, 1917, of the present General Immigration Law, hence this present General Immigration Act was most certainly within the general knowledge and observation of this court and was quite likely in mind, when, in the concluding paragraph of the opinion in the *Woo Jan case*, supra, it is set forth in part as follows:

> "This difference must be kept in mind. The Chinese Exclusion Laws have not the character or purpose of the Immigration Act. * * * The questions therefore which could arise were deemed different from any under the Immigration Act, and the Exclusion Laws are adapted to them and their procedure is hence saved by section 43".

A further and more recently decided case, that of *White v. Chin Fong,* U. S. ; 40 Sup. Ct. 449; decided on May 17, 1920, more than three years after the present General Immigration Law became effective, tends to confirm this view. It is there held as follows:

> "In the case of United States v. Woo Jan, 245 U. S. 552, we had occasion to consider the difference between the situation of a Chinese person in the United States, and one seeking to enter it; and held that the former was entitled to a judicial inquiry and determination of his rights, and that the latter was subject to executive action and decision. We think the distinction is applicable here, and that one who had been in the United States and has departed from it with the intention of returning is entitled under existing legislation to have his right to do so judicially investigated with 'its assurances and sanctions', as contrasted with the discretion which may prompt or the latitude of judgment which may be exercised in executive action."

As affecting the present litigation we are confronted with the fact that Ng Fung Ho, a returning merchant with an investigated status as a merchant, would be entitled to a judicial determination of his right to re-enter, had that right been withheld.

Can it by any parity of reasoning be held that his rights are any less because of his regular entry upon the order of the commissioner? Can he be deported by a less formal proceeding than he is entitled to in asserting his right of entry? We think not. Ng Yuen Shew was landed upon appeal by the secretary as his son. As to Gin Sang Get and Gin Sang Mo, they are citizens, but their rights as such cannot be less than that of the alien merchant as has been held by this court in *Tsoi Sim v. U. S.*, 116 Fed. 920, 925 (9th Circuit).

The paramount rights of American citizenship for a full and fair opportunity to be heard before the judicial branch of the Government should not be denied one who has been arrested here in our midst in the full and complete enjoyment thereof.

Gee Cue Bing v. U. S., 184 Fed. 383; 106 C. C. A. 493 (5th Circuit);

Moy Suey v. U. S., 147 Fed. 697; 78 C. C. A. 85 (7th Circuit).

See, also,

U. S. v. Jhu Why, 175 Fed. 630;

Pang Sho Yin v. U. S., 154 Fed. 660; 83 C. C. A. 484 (6th Circuit);

U. S. v. Charlie Dart, 251 Fed. 394.

The proposition of determining the question of American citizenship of one arrested here in our midst without a judicial hearing seems to us preposterous. The petitioners may be obscure personages of the Chinese race, but the rights of American citizenship are sacred and entitled to the full

protection of the law as was lately and on June 7, 1920, declared by this court in the case of *Kwock Jan Fat v. White,* U. S. ; 40 Sup. Ct. 566, where it is held:

> "It is better that many Chinese immigrants should be improperly admitted than that one natural born citizen of the United States should be permanently excluded from his country."

The difference between the executive hearing accorded by the Secretary of Labor, with its limited right of counsel and star chamber methods, and a judicial hearing was most clearly and convincingly set forth in the *Woo Jan case,* supra, by this court as follows:

> "The difference is marked. It is the difference between administrative and judicial action; and the government recognized that the difference—we might say contrast—is the step on which it 'must fall down, or else o'leap'. And necessarily so. Manifestly the remedy of section 21 has not the safeguards of impartiality and providence that the remedy of the Exclusion Laws has. Mere discretion prompts the first and last act of the former; the latter has the security of procedure and ultimate judgment of a judicial tribunal, where all action which precedes judgment is upon oath and has its assurance and sanctions."

If a citizen of the United States, residing in peace in his own country as part and parcel of its citizenship and population, may be taken into custody by an *administrative action* where *mere discretion prompts the first and last act* and deprived of his right of residence in the country of his citizenship and be subjected to nothing short of banishment,

then indeed is the priceless heritage of American citizenship most perilously exposed. In the celebrated case of General Castro, the former President of Venezuela, which arose when he was refused admission to the United States by the Immigration authorities, and which caused the eyes of the world to be centered on our judiciary, which is reported as *U. S. v. Williams,* 203 Fed. 155, it is held:

> "Aliens have the right to enter the United States except so far as the right is restricted by our statutes. * * * The burden is upon the immigration authorities to show that any alien denied the right to enter does fall within one of these exceptions to the general privilege. Although an alien who has not yet entered may not enjoy the constitutional guaranties of citizens, he has rights under this law which must be respected".

What are *"the constitutional guaranties of citizens"* here adverted to if one found in the possession and enjoyment of citizenship here in our midst as part and parcel of our citizenship and population, may be taken and deprived of these priceless blessings in a purely *administrative action* where *mere discretion prompts the first and last act?* We cannot resign ourselves to any other conclusion than that they are entitled to a hearing in a *judicial action* which alone *has the security of procedure and ultimate judgment of a judicial tribunal where all action which precedes judgment is upon oath and has its assurance and sanctions.*

This cause is submitted to this court for its decision upon the great and far reaching questions here

involved and presented. It presents also a difference in judicial decision between the courts of appeal of the Fifth and Ninth Circuit, upon a question which is of great and vast importance to many citizens of this country, though of the Chinese race, and many alien Chinese who live here within the protection of our treaty with their country and ours, and as a result of which laws were past which assured to them a judicial hearing of their right of residence should that question ever be urged against them.

Dated, Washington, D. C.,
December 1, 1920.

Respectfully submitted,

JACKSON H. RALSTON,
GEORGE W. HOTT,
Attorneys for Petitioners.

GEO. A. MCGOWAN,
Of Counsel.

CERTIFICATE OF COUNSEL.

We hereby certify that the foregoing petition for a writ of certiorari is, in judgment of counsel, well founded and is not interposed for delay.

Dated, Washington, D. C.,
December 1, 1920.

JACKSON H. RALSTON,
GEORGE W. HOTT,
Attorneys for Petitioners.

GEO. A. MCGOWAN,
Of Counsel.

MOTION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Now comes Ng Fung Ho, otherwise known as Ung Kip, Ng Yuen Shew, Gin Sang Get and Gin Sang Mo, by their attorneys in their behalf, and moves this Honorable Court that it shall by certiorari or other proper process, directed to the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit, require said court to certify to this court, for its review and determination, insofar as it affects your petitioners, a certain cause in said Court of Appeals lately pending, wherein your petitioners were of the parties appellant, the complete title of the cause being, Ng Fung Ho, otherwise known as Ung Kip; Ng Yuen Shew; Lui Yee Lau, otherwise referred to as Louie Pon; Gin Sang Get and Gin Sang Mo, Appellants, vs. Edward White, as Commissioner of Immigration for the Port of San Francisco, Appellee. That this motion may be granted your petitioners respectfully offer herewith their petition and brief in support thereof, also a certified copy of transcript of record of all proceedings in the United States Circuit Court of Appeals for the Ninth Circuit. All original documents are offered with the required number of copies.

Dated, Washington, D. C.,
December 1, 1920.

JACKSON H. RALSTON,
GEORGE W. HOTT,
Attorneys for Petitioners.

GEO. A. MCGOWAN,
Of Counsel.

NOTICE OF MOTION.

To the Respondent in the above entitled matter, and to A. Mitchell Palmer, Attorney General of the United States:

Please take notice that on Monday, the 6th day of December, 1920, at the opening of the court on that day, or as soon thereafter as counsel may be heard, Ng Fung Ho, otherwise known as Ung Kip, Ng Yuen Shew, Gin Sang Get and Gin Sang Mo, petitioners herein, will upon their petition and copies of the entire record of this action, submit a motion, a copy of which and of the petition for a writ of certiorari and brief in support thereof, are herewith delivered to you, to the Supreme Court of the United States, in its court room at the Capitol, in the City of Washington, District of Columbia.

Dated, Washington, D. C.,
December 1, 1920.

JACKSON H. RALSTON,
GEORGE W. HOTT,
Attorneys for Petitioners.

GEO. A. MCGOWAN,
Of Counsel.

APPEARANCE.

To the Clerk of the United States Supreme Court:

Please enter the undersigned as attorneys of record for the petitioners in the above-entitled matter.

Dated, Washington, D. C.,
December 1, 1920.

JACKSON H. RALSTON,
GEORGE W. HOTT,
Attorneys for Petitioners.